In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3952

GREAT NORTHERN RAILWAY COMPANY, a corporation, and BELLINGHAM BAY IMPROVEMENT COMPANY, a corporation, *Appellants*,

vs.

ALBERT R. McPHEE and FRANCES McPHEE, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANTS' PETITION FOR REHEARING

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APPELLANTS' PETITION FOR REHEARING

Appellants respectfully petition the court to grant a rehearing and reargument of this case, upon the ground that the court has failed in its decision to notice or decide important questions of

law presented by the appellants' original briefs herein, to-wit:

1. That the O'Donnell claim had not attached or been initiated as early as the date of the filing of the selection list;

2. That the land claimed by the appellees is not coincident with the O'Donnell claim to more than forty acres of the land in controversy;

3. That when the selection list was filed in 1902 there was no conflict between the land claimed by O'Donnell in Section 11, and that claimed by the Railway Company in Section 12, and that the successors of O'Donnell could not, when a change was made in the survey, shift their claim upon the Railway Company's land.

This motion is based upon the record of this court in this cause, the brief appended hereto and the certificate of counsel required by Rule 29.

THOMAS BALMER,
Solicitor for Appellant,
Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Appellant,
Bellingham Bay Improvement Company.

BRIEF

We shall not cavil at the decision rendered on the subjects considered by the court, but since this case is one of which the United States Supreme Court has appellate jurisdiction, we are most earnestly desirous that this court render a complete decision on all the questions presented by the record and raised in the original briefs.

The decision of this court is subject to review by the United States Supreme Court on appeal. The petition for removal was based both upon diverse citizenship of the parties and Federal questions shown by the complaint, and these Federal questions are likewise apparent upon the face of the second amended complaint upon which the case went to trial in the district court (Tr. 1-10). The appellate jurisdiction of the Supreme Court is therefore clear. *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U. S. 12, 63 L. Ed. 447; *Weiland v. Pioneer Irrigation Co.*, 66 L. Ed. 639; *Northern Pacific R. Co. v. Soderberg*, 188 U. S. 526, 47 L. Ed. 575. Appellants submit that they should not be placed under the disadvantage of asking the

Supreme Court to review questions which, though squarely presented to this court in the original briefs, have not been noticed in the decision. Those points will be briefly stated.

(1) *The O'Donnell Claim had not Attached or Been Initiated as Early as the Date of the Filing of the Selection List.*

In deciding that the land was reserved from selection by reason of the O'Donnell settlement, the court seems to have done nothing more than examine the decision of the Land Department rejecting the homestead entry of McPhee (Tr. 76-81), and to have ignored the evidence taken at the trial. The court must have overlooked the fact that the McPhee proceedings in the Land Department were entirely ex parte as to the appellants. Of course if the court looks only at those ex parte proceedings the claims of the appellees may be found justified, for it is there stated:

"The affidavit of McPhee alleges that the land applied for by him was in 1901 embraced in the settlement of one Al Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of the Railway Company's list." (Tr. 77.)

But Al Small's evidence at the trial and that of appellee's other witnesses did not substantiate this affidavit. On the contrary, no one testified that O'Donnell had established a residence or had settled upon the land in May, 1902. In fact, Small testified that in April or May, 1902, the cabin which O'Donnell had bought the preceding fall from a prior settler was roofless and unoccupied (Tr. 238). Small's testimony is brief (Tr. 235-241; 244-246), and is extremely vague as to the time and character of O'Donnell's tenure. It is the only evidence in the record on that subject. It is the only evidence opposing the patent. The law of the case on such a record is clear and logical.

First, the McPhee proceedings in the Land Department were ex parte, and consequently the evidence there tendered by McPhee was not binding in any sense upon the Railway Company. It has already been so held by this court in the opinion filed in this case as respects the controversy between Thurston and McPhee. *Unita Tunnel Co. v. Creed and Cripple Creek Mining & Milling Co.*, 119 Fed. 164; *Creed Mining & Milling Co. v. Unita Tunnel Co.*, 196 U. S. 337, 49 L. Ed. 501. If McPhee was not bound by the Thurston proceedings

in the Land Office because he was not a party to them, then the Railway Company was not bound by the McPhee proceedings there, to which it was never a party.

Second, it was incumbent upon McPhee to prove the allegation that O'Donnell had initiated a claim to this land at the time of the filing of the selection list by clear, unequivocal and convincing proof. *Oregon & California R. Co. v. U. S.*, 190 U. S. 186, 47 L. Ed. 1012; *Maxwell Land Grant* case, 121 U. S. 325, 30 L. Ed. 949; *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747; *United States v. Des Moines, Nav. etc., Co.*, 142 U. S. 510, 35 L. Ed. 1099; *United States v. Budd*, 144 U. S. 154, 36 L. Ed. 384; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 L. Ed. 144; *United States v. Stinson*, 197 U. S. 200, 204, 49 L. Ed. 724. A patent is no longer an instrument of respect and security if subject to be overthrown by such fugitive, self-contradictory and uncertain evidence as that offered by the plaintiff at the trial concerning the O'Donnell claim.

Third, although O'Donnell in October, 1901, purchased the improvements of a prior settler, that

fact did not initiate any settlement right in his own behalf. *Knight v. Haucke*, 2 L. D. 188; *Willis v. Parker*, 8 L. D. 623; *Bunger v. Dawes*, 9 L. D. 329; *Esperance v. Ferry*, 13 L. D. 142; *Stone v. Cowles* (on review), 14 L. D. 90; *Leonard v. Northern Pacific R. R. Co.*, 15 L. D. 69; *Matthews v. Barbarovie*, 18 L. D. 446; *Dobie v. Jameson*, 19 L. D. 91; *Da Cambra v. Rogers' Heirs et al.*, 19 L. D. 237; *Kelso v. Hickman*, 26 L. D. 616; *Medimont Townsite v. Blessing*, 27 L. D. 629.

Fourth, he could establish a settlement right only by taking up a residence on the land, and according to the testimony of his own sister, he never made his home there (Tr. 249-252), while, according to the testimony of Small, the dates of his earliest visits to the land did not occur prior to the filing of the selection list (Tr. 238, 245, 246).

Fifth, unless O'Donnell had settled on the land at the time of the filing of the selection list in May, 1902, the land was not exempt from selection. *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941; *Great Northern R. Co. v. Hower*, 263 U. S. 702, 59 L. Ed. 798. Unless he was living on the land when the scrip was filed the land was open to selection, for, as said in the opinion already rendered in this case concerning this same settler:

"Residence on one tract will not support a homestead claim to another and distinct tract."

We are confident that if the court will examine this question in the light of the evidence submitted at the trial and not upon the ex parte statements and affidavits tendered by McPhee to the Land Department, it will conclude that the land was not reserved by reason of any settlement by O'Donnell at or prior to the time of the filing of the selection list.

(2) *The Land Claimed by Appellees is not Coincident with the O'Donnell Claim to more than Forty Acres of the Land in Controversy.*

The trial court found a privity between O'Donnell and McPhee as to only forty acres of the land in controversy, saying in the memorandum opinion of July 19th, 1921:

"The cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the southwest quarter of the northwest quarter of Section 12 at the time the scrip was filed; that O'Donnell conveyed his right to his claim, *including the southwest quarter of the northwest quarter* to Thurston, and that Thurston conveyed his right to the *southwest quarter of the northwest quarter* to Beebe is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive,

and Thurston testifies that 'being a quarter of a mile back from there I drops one forty and takes another forty.' *The forty that he dropped was the forty that Beebe obtained, on which was the cabin,* and the forty Thurston took was the forty he got from Beebe." (Tr. 218-219.)

O'Donnell himself when a witness in the Land Department described his claim as containing only forty acres of the present McPhee claim (Tr. 151). It is true that the forty he mentioned was different from the one found by the District Court to have been dropped by his successor, Thurston, to Beebe; but the discrepancy is readily explainable in view of the uncertainty as to the location of the cabin with reference to the official survey (Tr. 235, 247, 256).

But the point is put beyond doubt by the evidence of Beebe. Beebe's original homestead claim was initiated in August, 1906, while O'Donnell was still holding his claim. Beebe's claim covered the south half of the southwest quarter of Section 1, and the north half of the northwest quarter of Section 12. This included the northwest quarter of the northwest quarter of Section 12, which the court by its decision necessarily finds to have been a part of the O'Donnell claim. *But Beebe did not claim as successor of O'Donnell. He was a contemporary*

of O'Donnell, and their claims were to different land. He did not buy his claim from O'Donnell, but held it as a matter of original entry himself. This was in August, 1906 (Tr. 215), and O'Donnell did not sell out to Thurston until October, 1906 (Tr. 216). Obviously when Thurston purchased the claim of O'Donnell he did not assert any right to any land then held by Beebe, because in November, 1906, he paid Beebe fifty dollars to change his claim to the southwest quarter of the southwest quarter of Section 1, the west half of the northwest quarter and the northwest quarter of the southwest quarter of Section 12—one hundred and sixty acres lying one mile long, north and south. He thus changed his claim from one-half mile square to one mile long, but he continued to include in it the northwest quarter of the northwest quarter of Section 12. He held that forty acres, which never had been O'Donnell's, and he got from Thurston in the deal only one forty acres that had ever been O'Donnell's. That was the forty containing the cabin, which, as the trial court said, Thurston "dropped" to Beebe in the exchange. Only from that time and as to that particular land could Beebe and his successor McPhee trace their title or succession back to O'Donnell.

Beebe was thus in possession of the north forty acres of the present McPhee claim as a part of his own homestead while O'Donnell was still claiming his own homestead. It is inconceivable that the court should now hold that the O'Donnell claim included land of which another homesteader was concededly in possession at and prior to the time O'Donnell disposed of his claim. If the court will examine the trial court's memorandum opinion of July 1st, 1921, and the Land Department's decision therein quoted, in connection with the testimony of Beebe in the trial of this case (Tr. 242-243), it will be convinced that Beebe, the predecessor of McPhee, did not come into possession of any part of the O'Donnell claim until Thurston "dropped" the forty containing the cabin, and that McPhee cannot trace succession from O'Donnell except as to that forty acres. Consequently even on the basis of the decision already rendered, only that particular forty acres was exempt from selection by the Railway Company.

(3) *When the Survey Shifted the Appellees and Their Predecessors could not Shift their Claim upon Land which had previously been Selected by the Railway Company without Conflict with any Settler.*

The court has failed entirely to notice this point, which is of great importance. The selection list filed May 9th, 1902, selected "that which will be, when surveyed, the west half of the northwest quarter and the northwest quarter of the southwest quarter of Section 12" (Defendants' Exhibit "A"). The Act of August 5th, 1892 (26 Stat. 390), permitted the selection of unsurveyed land, with the requirement that within three months after survey a new selection list be filed describing the tracts according to survey. It is not disputed in the present case that this was done.

When the selection list was filed in 1902 there was concededly no conflict between the O'Donnell claim (admitting that it had been then initiated) and the tract selected by the Railway Company. The O'Donnell claim was located according to what was known as the unofficial Galbraith survey, and to the extent that it covered any land now within the McPhee claim it was in the east string of forties

of Section 11 as then surveyed (Tr. 239). The official survey filed in 1907 moved the east line of Section 11 westward approximately 825 feet, and about two-thirds of the land in controversy thus fell into Section 12 (Tr. 236, 239, 256). About one-third of the land in the east line of forties of Section 11 by the old survey still remains there by the official survey. The remaining two-thirds is now a part of the west line of forties of Section 12, which was selected by the Railway Company.

It seems to be the contention of the appellees, and is apparently the silent holding of the court, that when the survey shifted it was competent for the predecessors of the appellees to shift their claim with it, although they had publicly advertised to the world that their claim was in Section 11. They are now permitted to take an equal quantity of land in Section 12, although in the meantime the land in Section 12 had been selected in good faith and unequivocally claimed by an innocent party. And this is allowed, although the land itself is only partially identical with that formerly claimed.

Appellants claim the same land they have always claimed. Appellees, on the contrary, shifted their

claim in 1907, and then for the first time created a conflict. They shifted not merely to the extent of the change of survey, but some 495 feet beyond it.

We submit that when it was found by McPhee's predecessor that the lines of Section 11, in which their claim lay, had been shifted to the westward by the official survey, their claim should have been required to conform to the survey. If there was no other occupant or claimant of the land newly covered by their description no one would be harmed. If there was an adverse claim, the conflicting rights might have been adjusted to the satisfaction of the parties under the settled practice of the Land Department, or by a court of equity if an agreement were impossible. Authorities to this effect are cited on pages 132 to 135 of the original brief. Since the present case is one in equity, we submit that the court should not sanction a rule so inequitable as to allow the shifting of the claim in the opposite direction of that in which the survey moved, and farther than the survey moved, to the injury of the appellant Railway Company, which had years before recorded its claim in the Land Office, and described the tract claimed once for all time as definitely ly-

ing in Section 12 wherever Section 12 might fall upon the filing of the official survey.

The court must realize the disadvantage at which the appellants will lie in endeavoring to have the Supreme Court of the United States examine these questions when they have not been noticed in the opinion of this court. They were definitely raised in the original briefs, and we submit that we are entitled to the careful judgment of this court upon them. It is therefore respectfully prayed that the court grant a rehearing, or at least supplement its former opinion by including these questions in the decision.

Respectfully submitted,

THOMAS BALMER,
Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Improvement Company.

The undersigned, solicitors for the appellants in the above entitled cause, certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

THOMAS BALMER,
Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Improvement Company.